Supreme Court, U.S.
FILED
DEC 22 2000
CLERK

(4)

No. 00-776

IN THE

Supreme Court of the United States

MORGAN STANLEY DEAN WITTER & CO.,

Petitioner,

v.

JAMES ROSKIND,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

REPLY TO BRIEF IN OPPOSITION

THEODORE B. OLSON
Counsel of Record
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

JONATHAN C. DICKEY
GIBSON, DUNN & CRUTCHER LLP
1530 Page Mill Road
Palo Alto, California 94304
(650) 849-5300

Counsel for Petitioner

December 22, 2000

14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Judgment Below Is "Final" For Purposes Of This Court's Certiorari Jurisdiction 1

II. The Federal Question Is Ripe For Review 5

III. A Conflict Exists Among The State Courts 7

IV. The Decision Below Is Inconsistent With This Court's Preemption Jurisprudence 9

V. The Decision Below Rests Squarely On Federal Law 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

American Airlines, Inc. v. *Wolens*, 513 U.S. 219 (1995) 4

Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983) 4

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 2,3

Crosby v. *National Foreign Trade Council*, 120 S. Ct. 2288 (2000) 9

Doctors Assocs., Inc. v. *Casarotto*, 517 U.S. 681 (1996) 4

Geier v. *American Honda Motor Co.*, 120 S. Ct. 1913 (2000) 5,9

Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988) 4

Guice v. *Charles Schwab & Co.*, 89 N.Y.2d 31 (1996), *cert. denied*, 520 U.S. 1118 (1997) 7

Hawaiian Airlines, Inc. v. *Norris*, 512 U.S. 246 (1994) 4

Lytle v. *Household Mfg., Inc.*, 494 U.S. 545 (1990) 6

Statutes

15 U.S.C. § 78bb(a) 9

28 U.S.C. § 1257 1,3,4

TABLE OF AUTHORITIES—Continued

Page(s)

Other Authorities

SEC Release No. 37619A (Sept. 12, 1996) 8

Stern *et al.*, *Supreme Court Practice* § 3.12 (7th ed. 1993) 2

REPLY TO BRIEF IN OPPOSITION

Petitioner Morgan Stanley Dean Witter & Co. ("Morgan Stanley") demonstrated in its petition that the decision below irreconcilably conflicts with decisions of other courts regarding the preemptive effect of the federal securities regulatory regime, is inconsistent with this Court's preemption decisions, and is wrong as a matter of federal law. Respondent's brief in opposition all but ignores the merits of Morgan Stanley's arguments, focusing instead on a number of irrelevant procedural contentions. Respondent's submission casts no doubt on the appropriateness of granting immediate review in this case.

ARGUMENT

For the Court's convenience, Morgan Stanley will reply to respondent's arguments in the order they are presented in the brief in opposition.

I. The Judgment Below Is "Final" For Purposes Of This Court's Certiorari Jurisdiction

Respondent's principal argument is that the judgment of the Court of Appeal is not "final" within the meaning of 28 U.S.C. § 1257. Opp. 2-4. Respondent appears to miscomprehend the doctrine of finality as it pertains to this Court's certiorari jurisdiction.

At the outset, respondent contends that "Morgan Stanley's petition is not justiciable" because "it does not seek review from a final judgment of the highest court of a state." Opp. 2. To the extent respondent means to suggest that only decisions of the California Supreme Court are subject to this Court's review, any such sug-

gestion is obviously wrong. Decisions of state intermediate appellate courts are reviewable on certiorari where, as here, the state supreme court has declined to exercise its discretionary authority to review the intermediate court's decision. *See, e.g.*, Stern *et al.*, *Supreme Court Practice* § 3.12 at 114-15 (7th ed. 1993).

Respondent's more substantial contention is that the decision below is not "final" because "[t]he case below is at the most preliminary stage." Opp. 3. Morgan Stanley moved to dismiss respondent's complaint on the ground that his claims are preempted by federal law. The state trial court granted that motion, thus terminating the litigation. The appellate court reversed, holding that federal law stands as no barrier to respondent's prosecution of his state-law claims, and remanded the case to the trial court for further proceedings.

This Court's decisions make very clear that litigation in state court need not be completed before a state-court judgment is "final" for purposes of the Court's certiorari jurisdiction. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975) ("the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come"). In *Cox*, the Court set forth four categories of cases in which a federal issue has been finally determined notwithstanding the need for further state proceedings. Contrary to respondent's contention that "[n]one of those categories [is] implicated here" (Opp. 4), the fourth *Cox* category—a category that is, tellingly, omitted entirely from respondent's brief in opposition—is directly applicable in this case.

The *Cox* Court recognized that a state-court judgment is "final" within the meaning of 28 U.S.C. § 1257

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

420 U.S. at 482-483. That precisely describes this case: Although the federal issue could become moot should Morgan Stanley prevail on the merits, reversal of the judgment below on the federal preemption issue would be preclusive of *any* further litigation of respondent's state-law claims.

"In these circumstances," the *Cox* Court explained, "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 483. As Morgan Stanley established in its petition, a refusal immediately to review the decision below would erode important federal policies expressed in the complex scheme of securities law and regulation, particularly the congressionally mandated development of a "national market system" and the primacy afforded the Securities and Exchange Commission ("SEC") and the National Associa-

tion of Securities Dealers ("NASD") in regulating broker-dealers and ensuring investor protection.

Perhaps not surprisingly, this Court has previously, and expressly, held that a state court's denial of a litigant's claim that a state law is preempted by federal law, with the result that the action was remanded for further proceedings, falls within the fourth category of cases identified in *Cox*. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178-80 (1988); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983). Morgan Stanley cited these cases in its petition (at 2), yet respondent does not even mention them, much less attempt to distinguish them. That is undoubtedly because they are directly controlling on the finality question. Where, as here, a state court has overruled a defense of federal preemption that, if accepted, would completely bar further proceedings, that decision is "final" for purposes of the Court's certiorari jurisdiction. *Goodyear Atomic*, 486 U.S. at 179.

Indeed, perhaps because this proposition is self-evident, this Court regularly grants review of state-court preemption decisions, even where further proceedings are contemplated in state court, without even discussing the question of finality. *See, e.g., Doctors Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995); *Hawaiian Airlines, Inc.* v. *Norris*, 512 U.S. 246 (1994). Simply put, finality is no barrier to review in this case. The California Court of Appeal rejected a federal defense that, if accepted, would completely bar respondent's state-law claims. That decision is "final" within the meaning of this Court's jurisprudence interpreting 28 U.S.C. § 1257.

II. The Federal Question Is Ripe For Review

Respondent's next argument is that "[t]his case is not ripe for review in this Court." Opp. 5. That is because, respondent contends, "[i]t is only after full development through discovery and trial that a sufficiently formed case or controversy raising federal concerns could be shaped." *Id.* at 6. That is simply incorrect.

Morgan Stanley's preemption argument is straightforward: Respondent's state-law claims, by which he seeks to impose on Morgan Stanley trading standards that differ materially from prevailing federal law, conflict with the federal scheme of securities regulation and are, therefore, preempted. This argument is not dependent on discovery or trial, nor does it turn on whatever remedy the trial court might ultimately adopt. Instead, the conflict between respondent's claims and federal law is apparent on the face of the complaint. *See* Pet. 22-27; *infra* at 6-7. As a result, the federal question is justiciable—and ripe for review—at this stage of the proceeding. *Cf. Geier* v. *American Honda Motor Co.*, 120 S. Ct. 1913 (2000) (reviewing motion to dismiss state-law action on grounds of federal preemption).

Morgan Stanley presented its preemption argument in a motion to dismiss. Respondent did not argue in the trial court that the preemption question was not "ripe" for review. And the trial court obviously believed it to be ripe, since it granted Morgan Stanley's motion and ordered respondent's claims dismissed on the ground they were preempted by federal law. In appealing that judgment, respondent did not argue that the preemption question was not ripe, or that further proceedings were warranted. Instead, respondent argued—and the appellate court concluded—that his claims were not pre-

empted as a matter of law. And, when Morgan Stanley sought review of that determination in the state supreme court, respondent did not even attempt to argue that the issue was not ripe. It is too late in the day for respondent to raise ripeness for the first time in this Court.

In an obvious attempt to avoid the conflict between his claims and federal law, respondent asserts—also for the first time in this Court—that he is merely seeking to enforce federal securities regulations. *See* Opp. 5 (respondent "intends that the substantive standards to be applied to [Morgan Stanley's] conduct are those set forth in the NASD regulations"). This is directly contrary to his position in the court below, where respondent contended that *no* federal regulations governed the conduct at issue. *See, e.g.*, Resp. C.A. Reply Br. 18 ("'trading ahead' is an area which appears to be completely unregulated by federal law") (internal capitalization omitted). The Court need not consider contentions by a respondent that were not presented to the lower courts. *See, e.g.*, *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 551-52 & n.3 (1990).

In any event, respondent is simply wrong to suggest that his claims are not inconsistent with the prescriptions, and proscriptions, of federal law. As Morgan Stanley detailed in its petition (at 22-27), *each* of respondent's claims is fundamentally inconsistent with the corresponding regime of federal regulation. For example, respondent contends that Morgan Stanley was obligated (under state law) to obtain the "best price" for his trade order, even though federal law makes clear that broker-dealers are under no such best-price obligation. Pet. 23. Respondent also contends that Morgan Stanley was prohibited (again, under state law) from trading as

both principal and agent, even though such trades are expressly permitted by federal law. Pet. 25. And respondent contends that California law prohibited Morgan Stanley from "trading ahead" of his alleged market order, even though the NASD rule on this subject expressly applies only to unexecuted *limit* orders. Pet. 26-27. Respondent has not even attempted to explain how his allegations, which on their face go far beyond, and conflict with, existing federal law, can be read as nothing other than effort to enforce federal regulations in state court.

That the federal preemption question is ripe for review in this case is plain from the Court of Appeal's decision. The court below flatly held that the state courts have the authority to "forbid" trading ahead *in all circumstances*, notwithstanding the NASD's complex and detailed rules and exceptions on this subject. Pet. App. 11a. The court below also necessarily concluded that state courts have the authority to define a broker-dealer's "best execution" obligations differently than those obligations are spelled out in federal regulations. No discovery or other further proceedings are necessary to determine whether, as a matter of law, the ruling below conflicts with the detailed scheme of federal securities regulation. It is ripe for review.

III. A Conflict Exists Among The State Courts

Respondent asserts that the decision below does not conflict with cases such as *Guice* v. *Charles Schwab & Co.*, 89 N.Y.2d 31 (1996), *cert. denied*, 520 U.S. 1118 (1997), which (as discussed at some length in the petition (at 11-14)) held that state-law challenges to broker-dealer trading practices were preempted by federal law. Opp. 6-7. There is no conflict, according to respondent,

because the practice at issue in those cases—so-called "payments for order flow"—had been approved by the SEC. *Id.* at 6. Respondent's effort to minimize the conflict between the *Guice* line of cases and the decision below is unpersuasive.

Respondent's claims challenge practices that, like payments for order flow, have been considered and approved (or not forbidden) by federal regulators. As just one example, the SEC has expressly considered the practice of broker-dealers trading for their own accounts (as principals) at the same time they are trading for client accounts (as agents), and has concluded that "the Commission does not believe that a broker-dealer violates its best execution obligation merely because it . . . trades as principal with customer orders." SEC Release No. 37619A (Sept. 12, 1996). One of respondent's state-law causes of action alleges, however, that Morgan Stanley should be *prohibited* from trading as both principal and agent. C.A. App. 5. Just as in *Guice* and the other payment for order flow cases, respondent thus challenges a practice that has been sanctioned by the SEC. The conflict is real and evident.

More generally, the *Guice* line of cases stands for the proposition (which respondent does not even address) that state-law actions are preempted if they would interfere with the national market system overseen by the federal regulators. *See* Pet. 12-14. As Morgan Stanley has already demonstrated (*see id.* at 15-17), continued prosecution of respondent's lawsuit would have precisely that effect. Broker-dealers would be forced to comply with rigid requirements established, at the behest of a single aggrieved investor, by a California state court (and, potentially, by courts in 50 other jurisdic-

tions), rather than the detailed and complex scheme established and refined over the years by the federal agency and self-regulatory organizations charged by Congress with regulating the national market system.

IV. The Decision Below Is Inconsistent With This Court's Preemption Jurisprudence

As demonstrated in the petition, the court below entirely failed to acknowledge, much less apply, the doctrine of obstacle preemption. Pet. 17-21. The court also misconstrued the effect of the "saving clause" in the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a). Pet. 21-22. The court below thus did not adhere to the preemption analysis mandated by this Court's decisions. *See, e.g.*, *Crosby* v. *National Foreign Trade Council*, 120 S. Ct. 2288, 2296-98 (2000); *Geier*, 120 S. Ct. at 1924-25. In his brief in opposition, respondent asserts only that those cases involved "different factual and legal contexts." Opp. 7. He makes no effort, however, to defend the Court of Appeal's preemption analysis or to demonstrate that the decision below is not, in fact, inconsistent with this Court's precedents. That silence speaks volumes.

Respondent also cites a handful of cases in which this Court concluded that state claims were *not* preempted by federal law. Opp. 8-9. He fails to explain their relevance, however, asserting only that "[c]onsistent with these cases, allowing [r]espondent to bring his state court action does not present an obstacle to implementation of a federal scheme." *Id.* at 9. This is an *ipse dixit*, and nothing else. Nowhere in his brief in opposition does respondent explain *why* the maintenance of his state law claims would not conflict with federal law, as Morgan Stanley has demonstrated it would.

V. The Decision Below Rests Squarely On Federal Law

Respondent's final argument is that the "scope and breadth of a potential remedy available under state law" does not present a federal question. Opp. 10. At this juncture, however, Morgan Stanley does not challenge any remedial action by the state courts. Rather, Morgan Stanley seeks review of the Court of Appeal's conclusion that "there is no provision of federal law that preempts a state law *cause of action* . . . in these circumstances." Pet. App. 2a (emphasis added). The correctness of that determination is a federal question that warrants immediate review by this Court. Respondent's arguments to the contrary are unavailing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

JONATHAN C. DICKEY
GIBSON, DUNN & CRUTCHER LLP
1530 Page Mill Road
Palo Alto, California 94304
(650) 849-5300

Counsel for Petitioner

December 22, 2000